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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 680

UNITED ARTISTS CORPORATION AND HAL ROACH STUDIOS, INC.,

Petitioners,

vs.

BOARD OF CENSORS OF THE CITY OF MEMPHIS AND THE SHELBY COUNTY BOARD OF CENSORS,

Respondents

ANSWER, WITH SUPPORTING BRIEF, TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your respondents, the Board of Censors of the City of Memphis, and the Shelby County Board of Censors would respectfully insist that the decision of the Supreme Court of Tennessee should be affirmed, and in so doing, would further show that it will be necessary to briefly restate the main propositions involved herein.

Preliminary Statement

Petitioners herein are insisting that the facts presented in their original petition for certiorari state a case of censorship, while it is the principal contention of respondents, Board of Censors of the City of Memphis and The Shelby County Board of Censors, that no act of censorship has in fact taken place, and that the matters and things which have been developed herein amount to no more than that the Chairman of the Board of Censors advised petitioners herein that it would be unable to approve the picture. (R. 18).

It is further insisted on behalf of respondents that the petitioners herein were not the proper parties to institute these proceedings, inasmuch as they were not exhibitors within the meaning of the ordinances of the City of Memphis and the resolution of the County Court of Shelby County, Tennessee; that if it could be assumed that petitioners are the proper parties, that then and in that event they have not qualified to do business in the State of Tennessee.

It is likewise the further insistence of the respondents herein that petitioners are not entitled to use the method herein employed, namely, the use of the writ of certiorari, in lieu of a proper remedy such as injunction or declaratory judgment.

Statement of the Case

The Memphis Board of Censors was created by an ordinance of the City of Memphis passed on the 15th day of January, 1921, pursuant to Chapter 54 of the Private Acts of the State of Tennessee for the year 1921. (R. 9). The ordinances of the City of Memphis, as well as the resolution of the County Court of Shelby County deal with the

exhibition of motion pictures and not with their distribution. (R. 7-12). The prayer of the original petition for certiorari from the so-called action of the Board of Censors in substance is that said so-called action of the Board be reviewed and said action reversed; that the right to produce, distribute and exhibit talking motion pictures be adjudged to be entitled to the enjoyment and protection of the fundamental rights of freedom of speech and freedom of the press. It is further insisted that local censorship laws and the enabling statutes under which they were adopted be adjudged to be in contravention of the "due process" and the "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States, and also in contravention to the applicable provisions of the Constitution of Tennessee (Amended Petition, R. 20-25) and, therefore, unconstitutional and void. (R. 24).

In response thereto, the respondents filed their Motion to Dismiss, which in substance is as follows:

That the petitioners had not themselves undertaken to show the picture "Curley", and that no action is therefore taken against them; that the petition shows that no Memphis theatre has contracted or offered to show the picture, and that the alleged action of the Board has not prevented anyone having a right to act, from doing so; the petition further shows that no person has offered to exhibit the picture, and that the right to distribute same has not been interfered with, that the petitioners United Artists Corporation and Hal Roach Studios, Inc., are doing an intrastate business in Tennessee without qualifying as required by law; and further, that the alleged rights of petitioners, if any, grow out of business done illegally in Tennessee, and petitioners United Artists Corporation and Hal Roach Studios, Inc., therefore may not use the Courts of this State; that the alleged rights of petitioners

arose out of an intent to do an intrastate business without proper qualification; that the right to show a motion picture is merely a privilege; that no right of free speech has been denied petitioners, nor does the action of the Board interfere with petitioners' right to make any public statement through any recognized medium of public pronouncement; that there is no allegation except by way of conclusion that the Board has acted illegally or beyond its jurisdiction; that the Board had a reason for its action, and that the Court will not substitute its judgment for that of the Board which in this case is made final by law.

Other grounds of the motion set forth that the judgment of the Board shall not be overruled unless it clearly appears that the regulations attempted are beyond all reasonable relation to the subject—or are in excess of legislative power, or are arbitrary beyond possible justice; that petitioners are not entitled to a review on the merits; are not entitled to exhibit the picture, or to have the Court weigh the evidence on the merits; that the Ordinance of the City of Memphis is penal in character, and that the Court is without jurisdiction to enjoin prosecution for the violation thereof; that petitioners are not within the purview of the statutes, the ordinances and the resolution, and that their remedy would be by a proceeding for a declaratory judgment, writ of injunction, or other like remedy (R. 25-30).

The petitioners herein have, we believe, fully stated the contents of the judgment of the Circuit and the Supreme Courts of the State of Tennessee, and no further statement with reference thereto is considered necessary.

Reasons for Denying Writ

While petitioners herein have stated in the form of six questions the matters they believe to be involved, it would seem that the question they are most interested in is

Question Number One, wherein they claim that talking pictures are entitled to the protection of the fundamental right of freedom of speech and of the press, and that censorship as such, should be held unconstitutional. In so doing, they place great stress on the case of *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 92 L. Ed. 1260-1297 (1948). This case, in our opinion, is no authority, for it was specifically pointed out therein that "it bears only remotely, if at all on any question of freedom of the press."

The Second Question, relating to race or color, in view of the decision of the Supreme Court of the State of Tennessee, presents no issue which could reasonably be the basis for alleging grievance (R. 54).

This is likewise true of Question Number Three, wherein petitioners claim that no contracts can be made for local exhibition of pictures. This question we believe is completely and finally answered by the Supreme Court of the State of Tennessee in its opinion wherein it is stated in substance that the petition seeks to claim the right of freedom of speech for third persons who are not parties to this cause (R. 54).

While question Number Four will be hereinafter considered, it should perhaps be observed that petitioners, at page 28 of their application, state in substance that the opinion of the Supreme Court ignores the fact that petitioners are not engaged in any partnership or joint adventure, whereas the Supreme Court specifically held "The United Artists and the local exhibitor are jointly engaged in a local business enterprise, the distributor furnishing the mechanical device (the film) while the exhibitor furnishes the theater as well as the labor necessary to exhibit the picture" (R. 56).

In Question Five, petitioners claim to be aggrieved by the action of the Tennessee Courts because they are with-

out standing to maintain an action in the said Courts of the State of Tennessee, and this question we believe to be answered on the undisputed facts.

In Question Six, petitioners pose a rather unusual question which, in our opinion, has no substance, the question being in the nature of a charge that the Courts of the State of Tennessee have attempted to evade the constitutional rights of the petitioners by interposing non-federal grounds as a basis for its decision. It is believed that this question, in view of all of the facts contained in the record, is impertinent.

Following the pattern set by petitioners in advancing their arguments in their petition for certiorari instead of filing a separate brief, we will likewise attempt to show and prove in a brief and concise manner the following main facts which we believe to be controlling herein:

1. That the petitioners have no standing.

2. That if they should be considered as having a standing as proper parties, that certiorari under all the facts advanced herein is not the proper method for a consideration of their rights. Further, that if they have standing, and are proper parties, in a proper method of approach, that

3. Under the facts herein, petitioners are doing business illegally in the State of Tennessee as construed by the Supreme Court of the State of Tennessee under the pertinent statutes. The application thus made and the facts upon which it founded its judgment are controlling. (Appendix, Petitioners' Petition for Certiorari.)

4. That the right to show a motion picture is merely a privilege, that no right of free speech has been denied petitioners, nor does the action of the Board interfere with petitioners' right to make any public statement through any recognized medium of public pronouncement.

First Proposition

The first three parts of respondents Motion to Dismiss (R. 25-26) relate equally to the fact that petitioners have not undertaken to show the picture "Curley"; that no theatre or person who may be identified as those with whom the Board of Censors is empowered to deal has undertaken to show the picture, and that consequently, since the Board of Censors has no power or jurisdiction to enjoin, direct or penalize persons whose functions and business are such as the business of the petitioners, but may, under the plain scope of the act, the ordinances and resolution enjoin, direct or penalize only local distributors; that no official act has taken place. Further, that the right to distribute said picture has not been interfered with by any official act since the Board of Censors has no power to interfere with said distribution. It necessarily results from the foregoing that what has transpired is void and that no Court would have the power to entertain a proposal to review such a purported order. The further result is that the so-called action as reflected by the letter (R. 18) was coram non judice and advisory only, and affords neither basis nor reason for review or proper action of any kind.

It will be seen that petitioners herein do not fall within the category of persons dealt with in the pertinent sections of the ordinances and parts of the resolution, as no control is authorized over them. A casual reading of the ordinances (R. 7-8) and the resolution (R. 9-12) discloses that the Board of Censors may act in two situations: (1) It may look at a picture which is already being shown by an exhibitor and approve, delete or stop the showing (Secs. 1132-33-35) (R. 7-8); (2) It may require a showing of the picture by an exhibitor in advance (Sec. 1137) (R. 8-9). The real test of whether the petitioners herein would have been subject to the jurisdiction of the Board of Censors

would arise if an exhibitor should offer to show the said picture in a theater in Memphis and the Board should undertake to subject the petitioners herein to the penal provisions of the ordinance. There is hardly a question but that petitioners would then take the position that they were not qualified to do business in Tennessee, that they were not doing business in Tennessee and that such action, if any, should be taken against the local exhibitor. In this connection, it might be well to point out that the petitioners herein assert that by long established custom, the Censor Board has passed upon pictures prior to their sale by the distributor to the exhibitor, and thereby presumably would invoke the well known principle of law that practical interpretation of a statute, or an ordinance, by the officers charged with the administration, is entitled to great respect in the Courts, especially when long continued. This is a sound principle when applied to a doubtful or ambiguous statute, or ordinance, but when manifestly wrong or clearly erroneous, the Courts are never bound by such administrative construction. *National Funeral Home* v. *Delehite*, 15 Tenn. App. 482.

It is, we believe, well settled that custom and usage can never vary an ordinance or statute when there is no ambiguity present, nor can the failure of administrative officers to properly enforce an ordinance invalidate same, nor the right to violate a law be established by custom. Such custom cannot enlarge the scope of the act, nor create jurisdiction where none is granted. *United States* v. *Graham*, 110 U. S. 219, 28 L. Ed. 126, and *United States* v. *Finnell*, 185 U. S. 236, 46 L. Ed. 890; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. R. Co.*, 167 U. S. 479, 42 L. Ed. 243; *Hudson Motor Car Co.* v. *City of Detroit, et al.*, 275 N. W. 770; *Bennett* v. *Kalamazoo Circuit Judge*, 183 Mich. 200, 150 N. W. 141, Ann. Cas. 1016E, 223; *Frank Fluckiger* v. *City of Seattle*, 103 Wash. 330.

The learned Trial Judge, in reaching a determination on this phase of the case, pointed out that the petitioners were not engaged in the business of exhibiting pictures within the City of Memphis or County of Shelby, nor had they contracted to or offered to show or exhibit the picture in question within this jurisdiction as a local exhibitor (R. 31). The learned Chief Justice likewise, in the opinion of the Court, stated in substance that there was no evidence in the petition that petitioners had entered into a contract with an exhibitor to show the picture (R. 52). Further, in this opinion of the Court of last resort, the learned Chief Justice states in substance that the Constitutionality of the statutes and ordinances could not be questioned on the grounds of their abridgment of the right of "freedom of speech" except by someone who has the right to speak and is denied the privilege of speaking. This, in effect, notwithstanding the charge of evasion by petitioners herein, is a direct determination by the highest Court in the State of Tennessee of the scope of the pertinent statutes and ordinances which determination we believe to be final, under decisions too numerous to quote. *Kovacs* v. *Cooper,* 336 U. S. 77 (1949), 97 L. Ed. 379, 391; *United States* v. *Burnison, et al.; United States* v. *Gayety, et al.,* Vol. 70, No. 9, S. Ct. Rep. 503.

That this holding of the Supreme Court of the State of Tennessee correctly states the law is exemplified by the holding in the case strongly relied on by petitioners herein, namely *Pierce* v. *Society of Sisters,* 268 U. S. 510, 536, 69 L. Ed. 1070, 1078, wherein this Court, in dealing with this very question, states in no uncertain terms that ". . . no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage." Petitioners herein neither have the right to

speak within the scope of the ordinance, nor is it even alleged that a contract for the sale of the picture herein involved has been executed. It might also be well to point out that the Pierce case involved a suit for an injunction, whereas it is extremely difficult, in view of the confusion of parties in the case under consideration, to determine the specific relief claimed by petitioners. Certainly, there is no authority for the issuance of an injunction in an original proceeding to review the action of a Board by a party or parties who have no standing under the clear and unmistakable terms of the ordinance in the first instance.

Second Proposition

It may, we likewise believe, be stated that mere usage cannot invest state officials or administrative boards with authority or powers not fairly or properly within the legislative grant. Assuming for purposes of argument only that such a practice did exist, it could not result that a distributor would have the right to do that which only an exhibitor could do under the terms of the ordinance, namely, to seek a review of the action of the Board of Censors by certiorari. In *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. R. Co.*, 167 U. S. 479, 42 L. Ed. 243, this Court, speaking through Mr. Justice Brewer, states: "But it would be strange if an administrative board could by any mere process of construction, create for itself a power which Congress had not given it."

The learned Trial Judge, we believe, correctly as well as clearly states the inevitable conclusion in the following manner: "Obviously these acts (statutes, ordinances and County Resolution) are limited in their scope and applicable only to local exhibitors within this jurisdiction who exhibit or undertake to exhibit pictures to the public for its entertainment. According to the petition filed, neither the

United Artists Corporation or Hal Roach Studios, Inc., were engaged in the business of exhibiting pictures within the City of Memphis or County of Shelby, nor had they contracted to or offered to show or exhibit the picture in question within the jurisdiction as a local exhibitor. Therefore, the action of the Board of Censors, consisting of a letter from the Chairman of said Board to United Artists Corporation, was coram non judice, or advisory only, and cannot now present a justiciable controversy to this Court." (R. 31.)

Chief Justice Marshall in *Weston et al.* v. *The City Council of Charleston,* 2 Peters (27 U. S.) 449, 464, 7 L. Ed. 481, 487 described a "suit" as follows: ". . . and is understood to apply to any proceeding in a Court of justice by which an individual pursues that remedy in a Court of justice which the law affords him."

Third Proposition

While we believe that we have clearly shown (1) that the petitioners have no standing; that if they should be considered as having standing as proper parties, that (2) certiorari under all of the facts advanced herein is not the proper method to consider their alleged rights; and (3) under the facts herein described, petitioners would be doing business illegally in the State of Tennessee. This last proposition is covered by parts Four, Five, Six and Seven of the Motion to Dismiss (R. 26-27), which proposition we further believe to have been fully covered by the opinion of the learned Chief Justice of the Supreme Court of the State of Tennessee, and while it needs no elaboration, it is perhaps well to refer to certain passages from the opinion which we deem to be most pertinent. After a recitation of the facts showing the method of operation of the petitioners United Artists as disclosed by the petition, (R. 56), the Court con-

tinues as follows: "In the light of the foregoing undisputed facts, there appears no escape from the conclusion that the United Artists has a financial interest in the outcome of every performance". And again, (R. 56) "United Artists and the local exhibitor are jointly engaged in a local business enterprise, the distributor furnishing the mechanical device (the film), while the exhibitor furnishes the theatre as well as the labor necessary to exhibit the picture. . . ."

Petitioners herein evidently place great weight on the case of *United Artists Corporation* v. *James,* 305 U. S. 410, 411, 412, 83 L. Ed. 256, 257, 258, while it is our insistence that this case does not control or determine the question of "doing business" herein. The *James* case does not touch the question herein involved and is not decisive of this case, as will readily be seen by the following.

Mr. Justice Stone delivered the opinion of the Court and had this to say:

> "This appeal requires consideration of but a single question: Whether appellee is subject to the provisions of a statute of West Virginia which lays a tax, measured by gross receipts 'Upon every person (including corporations) engaging . . . within this state in the business of collecting incomes from the use of real or personal property'."

It will be noted that the question of doing business was narrowed to the "business of collecting incomes from the use of real or personal property."

Mr. Justice Stone further said:

> "The district court, three judges sitting, adopted as its findings the facts as stipulated". From which the district court concluded, "that appellee was not doing business in West Virginia or engaged there in the business of collecting income from the use of personal property, within the meaning of the applicable taxing act. . . ."

It was also a part of the stipulation that no money was collected in West Virginia. (The general system of United Artists Corporation of doing business in the *James* case is substantially the same as shown by this petition, except for those allegations of this petition which show that this company in Tennessee has the practice of sending the films to Memphis and locally employing all necessary facilities for showing them to the censors for the purpose of qualifying that film for local business.)

The basis of the opinion is clearly shown to have pretermitted the broad question of whether or not the corporation was engaged in doing business in West Virginia within the meaning and purview of the statute of Tennessee on the subject. We earnestly submit that if the same question had been made in the *James* case, as is now made in this Court, the Supreme Court would have decided that United Artists Corporation was doing business in West Virginia, provided West Virginia statutes on the subject were the same as Tennessee's. We do not know what West Virginia statutes were as they are not shown by the opinion. A question of double taxes was also involved in that case, and the Court concluded in the words of Mr. Justice Stone that: "There was no legislative purpose in cases like the present James case to tax gross receipts apart from the business or activity of collecting them carried on within the State." A gross receipts tax had already been collected from the exhibition upon all receipts, not allowing credit for the percentage sent out of state to United Artists.

It is thus seen that by the stipulation it was admitted that United Artists Corporation was not doing business in West Virginia. This being true, this "excise tax" could not be levied upon them. The stipulation also did not con-

tain the facts set out in this petition showing that the United Artists Corporation had made two excursions into intrastate business: (1) for its own convenience it took this film out of commerce, voluntarily employed locally all labor and facilities for the purpose, and submitted it to a Board of Censors; and (2) when it took its film out of commerce and mingled it with the properties of the State for the purposes of providing a purely local entertainment. Censorship was not involved in the *James* case, which is another paramount distinguishing feature. These petitioners not only employed all the local facilities therefor, but through the employment thereof they then sought to invoke the machinery and the processes of the laws of Tennessee by requesting the censors to view and approve this picture. This was not required of them by the Ordinances or the Resolution. They are now estopped from complaining that anything happened to them as a result of this voluntary request and excursion into intrastate business.

In view of its importance, reference is likewise made to the case of *Interstate Amusement Co.* v. *Albert,* 128 Tenn. 417, 239 U. S. 560, 60 L. Ed. 439. This case makes clear and manifest respondents' position both with respect to the contention that petitioners are doing business of a local nature in Tennessee, and will also make manifest the fact that petitioners are bound by the holding of the Tennessee Courts. Among numerous other decisions to the same effect are *Quong Ham Wah Co.* v. *Industrial Accident Commission,* 255 U. S. 445, 65 L. Ed. 723; *Federal Trading Co.* v. *Iowa,* 322 U. S. 335, 88 L. Ed. 1309, in which case Mr. Justice Frankfurter stated the proposition as follows: "Application by that Court (Supreme Court of Iowa) of its local laws and the facts on which it founded its judgment are of course controlling here."

That this doctrine is well settled is further exemplified by the fact that this Court in April, 1950 denied an appeal in the very recent case of *A. H. Stone, Chairman State Tax Commission* v. *Riechman-Crosby Co.*, 43 So. 2, 184, Appeal Denied April, 1950, which Court held that Riechman-Crosby Co. was not doing business, under facts which were very similar to the case of *Federal Trading Co.* v. *Iowa, supra,* in which latter case it was held that the appellant was doing business and affirmed the action of the Supreme Court of the State of Iowa.

Fourth Proposition

The Fourth Proposition is one which is all enveloping. We submit that the so-called "Freedoms" argument is not and can not be legitimately involved herein for the reasons already assigned. It is obvious that if petitioners had instituted the only character of proceeding that might have been open to them as producer and distributor for injunction or declaratory judgment, they could not have hoped to successfully sustain such broad attack upon the constitutionality of censorship laws for it is well settled by the decisions and pronouncements of this Court, as well as the laws of all states having censorship statutes, that this is a proper exercise of the police power. (52 Am. Jur. 283; 64 A. L. R. 505); *Binford* v. *Carline,* 9 Tenn. App. 364.

We submit that the petitioners can find no support for such attack on the constitutionality of censorship of movies in the decision of this Court in the *Paramount* case. The question there dealt with primarily involved first-run business, and the Court said:

> "That problem has important aspects under the Sherman Act. But it bears only remotely, if at all, on any question of freedom of the press, save only

as timeliness of release may be a factor of importance in specific situations" (1297).

It is readily apparent that the above statement relied on should carry no weight when it is considered that it was used in a case arising under the Sherman Act and from the further statement of the Court that it bears only remotely if at all on any question of freedom of the press. It certainly cannot be compared with the direct and positive statement of Justice Frankfurter in a case arising under the police power.

Freedom of speech cannot be used as a guise to evade a valid exercise of the police power of the state in its operation on an activity purely commercial in its nature and not within the protection contemplated. The Court in *Jones* v. *Opelika* (Justice Reed, 1942), 316 U. S. 584, 593, 86 Law Ed. 1691, 1699, stated:

> "The rights of which our Constitution speaks have a more lasting quality. They are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument. Conflicts in the exercise of rights arise and the conflicting forces seek adjustments in the Courts, as do these parties claiming on the one side the freedom of religion, speech and press, guaranteed by the 14th Amendment, and on the other the right to employ sovereign power explicitly reserved to the State by the 10th Amendment, and on the other the right to employ sovereign power explicitly reserved to the State by the 10th Amendment to insure orderly living without which Constitutional guarantees of civil liberties would be a mockery."
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> "A book agent cannot escape a license requirement by a plea that it is a tax on knowledge. It would hardly be contended that the publication of newspapers is not subject to the usual governmental fiscal exactions

(citing cases) or the obligations placed by Statutes on other businesses (citing cases) . . ."

"Commercial advertising can not escape control by the simple expedient of printing matter of public interest on the same sheet or handbill. *Valentine* v. *Christenson* (1942), 316 U. S. 52, 86 L. Ed. 1262."

In the *Valentine* case the Court in an opinion by Justice Roberts upheld the validity of an ordinance prohibiting the distribution of advertisements by handbill, despite the publication on the reverse side thereof of a protest against the action of certain city officials. The lower Court had held the ordinance invalid because of difficulty of apportioning, in a given case, the contents of the communication as between what is of public interest and what is for private profit.

Said the Court in a unanimous opinion rendered by Justice Roberts, sustaining the validity of the ordinance:

"We need not indulge in nice appraisal based upon subtle distinctions in the present instance nor assume possible cases not now presented.

"It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent and for the purpose of evading the prohibition of the ordinance."

But on a true analysis of the instant case, these Constitutional questions are not here involved.

Petitioners would appear to rely principally on the fact that pronouncements of this Court in *Mutual Film Corp.* v. *Industrial Commission,* 236 U. S. 230, 59 L. Ed. 552, and *Mutual Film Corp.* v. *Hodges,* 236 U. S. 247, 59 L. Ed. 561, having been decided in 1915, are no longer applicable. This claim is made, notwithstanding that the above cited cases, as well as the case of *Binford* v. *Carline, supra,* have con-

sistently been followed. *Eureka Products, Inc.* v. *Byrne, et al.*, 300 N. Y. S. 219; *Hughes Tool Co.* v. *Fielding*, 73 N. Y. S. (2d) 98.

It is also of importance to note that in the recent case of *Hughes Tool Co.* v. *Fielding, supra,* it was specifically held that the producer was a proper party to bring a suit for a declaratory judgment and an injunction under the practice prevailing in the State of New York. It was also specifically held in the case of *Pathe Exchange* v. *Cobb*, 195 N. Y. S. 661, 202 App. Div. 450, 64 A. L. R. 508, that the presentation of events by use of motion pictures was not a part of the press of the country, and was subject to regulations.

A short excerpt from *American Committee on Maternal Welfare, Inc.* v. *Mangan, et al.*, 14 S. 2, 40, 257 App. Div. 570, is enlightening: "It is thought that times have changed since these cases were decided, nevertheless, the exhibition of this picture . . . would serve no useful purpose. . . ."

One of the latest pronouncements on this subject is to be found in the language of a separate concurring opinion in *Kovacs* v. *Cooper*, 336 U. S. 77, 1949, 93 L. Ed. 379, 391 by Mr. Justice Frankfurter, as follows:

> "Movies have created problems not presented by the circulation of books, pamphlets or newspapers, and so the movies have been constitutionally regulated."

citing *Mutual Films Corp.* v. *Industrial Commission, supra.*

Likewise, in *Kovacs* v. *Cooper*, at page 385:

> "The constitutionality of the challenged ordinance as violative of appellant's right of free speech does not depend upon so narrow an issue as to whether its provisions are cast in the words of prohibition or regulation. The question is whether or not there is a real abridgment of the rights of free speech."
>
> "Of course, even the fundamental rights of the Bill of Rights are not absolute."

Summary

Respondents herein have attempted to and believe that they have answered the principal questions involved herein. However, it should be emphasized that Question Number Five at page 15 of petitioners' application assumes a right in petitioners that certainly does not exist. As above stated, petitioners, for obvious reasons, refrained from a broad frontal attack upon the distinctions which have been uniformly recognized with respect to the constitutionality of regulating movies. Petitioners, on the other hand, deliberately chose a narrow flank attack by certiorari for review of the alleged action of a purely local board, which is admittedly void and beyond the scope of the local Acts and was so declared both by the Trial Court and the Supreme Court of the State.

Petitioners cannot avoid the inevitable consequence of this choice deliberately made. They cannot claim the status of a local exhibitor on the one hand, in an effort to sustain their right to certiorari of such void action of the Board of Censors and, in the same breath, claim under the Commerce Clause immunity from state domestication as foreign producer and distributor.

Respondents do not believe, in view of the presentation herein made, that additional defense to questions involving statutory or common law certiorari, other than as already covered, is further necessary. This is especially true when we consider that the Supreme Court of the State of Tennessee in its opinion stated that that Court was not in disagreement with the fundamental principle that there is no authority to use race or color as the sole legal basis for censorship of talking motion picture (R. 54).

Petitioners appear to be greatly aggrieved in that they claim that the Supreme Court of the State of Tennessee

failed and refused to adjudge that local censorship, both general and specific, violate the freedoms secured by the First and Fourteenth Amendments to the Constitution. As we have already seen, they further claim that the Supreme Court has evaded and avoided the principal issue by interposing non-federal grounds.

This claim is made apparently for the reason that neither the Trial Judge nor the Supreme Court of the State of Tennessee thought that an isolated statement taken from a case in which it was later pointed out "bore only remotely, if at all, on the question of freedom of the press", should be followed when the authority of *Mutual Films Co.* v. *Industrial Commission, supra; Mutual Films Corp.* v. *Hodges, supra,* and *Binford* v. *Carline, supra,* had been frequently challenged but never departed from.

A pertinent statement is likewise to be found in The Rise and Place of The Motion Picture, 254 Annals of the American Academy of Political and Social Science, page 9. The author, after stating in substance that the original bill in the *Paramount* case, *supra,* "professed to be concerned with the whole public interest and promised to seek control of everything from the Hollywood talent pool to the price of film fourth-run at Bad Axe", concluded with the following: "As the case moved into the final phase on appeals to the Supreme Court it had narrowed chiefly to film sales issue between distributor and exhibitor. The public at no time appeared interested. It probably had nothing important at stake." It is indeed rather odd that a case which now appears to be the backbone of petitioners' argument should have left the impression that the public did not appear interested, and there was nothing important at stake. If freedom of speech had been involved, it is natural to

assume that a definite conclusion thereon would have been drawn.

The previous restraint petitioners speak of as described in *Near* v. *Minnesota,* as applied to the press would, in our humble opinion appear ridiculous, had it been injected as a defense in the case of *United States* v. *Alpers,* Vol. 70, No. 7, S. Ct. Rep., 352, wherein this Court construed a Federal statute prohibiting the depositing of obscene books, pictures and other matters of indecent character. 18 U. S. C. A. 1462. It would seem that the inevitable result of applying "The previous restraint" doctrine to moving pictures would be to bring about the total destruction of the almost sacred position of the doctrine of freedom of speech, as construed in the numerous pronouncements of this Court.

We do not believe that the charge made in the closing paragraphs of the petition that the State Courts have sought to evade the principal issues by interposing unsubstantial non-federal grounds, is justified in view of the well settled main propositions involved herein.

It can, we believe, be repeated, certainly for emphasis, that fundamental principles cannot be departed from if a systematic and orderly arrangement is to prevail. As stated in 1 Am. Jur. paragraphs 3 and 4, page 405, "Causes of action should be distinguished from remedies. The cause of action and the remedy sought are entirely different matters. One precedes, and it is true gives rise to the other, but they are separate and distinct from each other, and are governed by different rules and principles."

Conclusion

We respectfully pray, based on the reasons set forth, that the petition for a writ of certiorari should be denied,

and that the action of the Supreme Court of the State of Tennessee should be affirmed.

Respectfully submitted,

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Certificate

I, J. S. Allen, one of the Attorneys for Respondents, hereby certify that I have this day personally delivered to Honorable Hamilton E. Little, one of the Attorneys for Petitioners, a true copy of the foregoing Answer with Supporting brief.

This 15th day of April, 1950.

J. S. Allen.